Symposium – Crisis and Constitutional Pluralism in the European Union

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The ratification difficulties associated with the Maastricht Treaty – not least the German Bundesverfassungsgericht's (BVerfG) assertion of the supremacy of the German constitution during German ratification[1] – and its creation of a 'Europe of Bits and Pieces',[2] signalled a watershed in the European integration project and a move away from the federalist-oriented 'permissive consensus' which had marked the preceding era.[3] Even if the idea of crisis in European integration was not new,[4] it is no exaggeration to say that Maastricht was the beginning of an era of semi-permanent crisis in European integration.[5]

Crisis can, however, be 'salutary'.[6] The post-Maastricht era was marked by a flourishing of creative new thinking about the integration project in the legal academy, offering fresh insights and ideas about European legal integration beyond the conventional neo-functionalist and federalist accounts.[7] Perhaps one of the most enduring of these new

[1] *Brunner v European Union Treaty* (Case 2 BvR 2134/92 and 2959/92 JZ 1993, 1100) [1994] 1 CMLR 57 (*Maastricht*). Also, Denmark rejected the treaty in a referendum and was only persuaded to ratify after opt-outs were secured.

[2] D Curtin, 'The Constitutional Structure of the European Union: A Europe of Bits and Pieces' (1993) 30 Common Market Law Review 17

[3] L Hooghe and G Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39 British Journal of Political Science 1

[4] Previous events such as the failure of the European Defence treaty and the 'empty chair' crisis posed their own distinctive challenges to the project. See generally, A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (UCL Press : 1998).

[5] Hot on the heels of the Maastricht aftermath came the Nice reforms with an Irish 'no' at the first attempt, the failure of the constitutional Treaty in 2005 as well as the difficult ratification of Lisbon Treaty (involving another Irish 'no').

[6] N Walker, 'A Constitutional Reckoning' (2006) 13:2 *Constellations* 140-150, 149.

[7] See for example M Cappelletti, M Seccombe, J Weiler (eds), *Integration through Law: Europe and the American Federal Experience / Vol. 1, Methods, Tools and Institutions* (Wde Gruyter 1985); C Mac Amhlaigh, 'Concepts of Law in Integration through law' in D Augenstein (ed), *'Integration through Law' Revisited: The Making of the European Polity* (Ashgate Pub 2012); G de Búrca, 'Rethinking Law in Neofunctionalist Theory' (2005) 12 Journal of European Public Policy 310.

'dynamics' of legal integration,[8] was MacCormick's constitutional pluralism. When Neil MacCormick first articulated his preliminary thoughts on the idea of constitutional pluralism in his 1992 Chorley lecture at the London School of Economics, European integration was in the throes of the Maastricht crisis.[9] His account of heterarchically interacting legal systems, seemed distinctively apt to account for the post-Maastricht fallout, and in particular, the BVerfG's assertion of the supremacy of the German basic law in its interactions with EU law.[10] It has also spawned a particularly fertile area of scholarship, with the idea spreading well beyond its original domicile of the relationship between EU law and state law.[11]

This symposium returns to the roots of the idea of constitutional pluralism in the context of crisis in European integration. It examines the extent to which the idea, forged in the crucible of the crisis-ridden Maastricht era, is suited to the (in many ways radically different) crises facing the project today. The frequency and intensity of crises affecting the European integration project since 2008 are arguably unprecedented in its history. The sovereign debt and euro crisis; the migration crisis precipitated by the Syrian war; the rule of law crisis in certain post-2004 Member States; secessionist attempts in Scotland and Catalonia; and the rise of Eurosceptic populism across the bloc culminating in the trauma of a Member State seeking to leave the Union for the first time (following the UK's 2016 referendum on EU membership), will surely result in the post-2008 period being marked in the annals of European integration history as the Union's darkest hour to date.

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[8] J .Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) 16 Oxford Journal of Legal Studies 231

[9] The piece opens with a reference to debates about sovereignty in the House of Commons during UK ratification of the Maastricht treaty. N MacCormick, 'Beyond the Sovereign State' (1993) 56 The Modern Law Review 1.

[10] As explored by MacCormick in his article on the Maastricht judgment itself: N MacCormick, 'The Maastricht Urteil – Sovereignty Now!' (1995) 1(3) European Law Journal 259-266.

[11] Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 The Modern Law Review 317; Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012); T. Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart 2019).

Each of the Symposium contributions examines a particular crisis of the post-2008 era through the lens of constitutional pluralism, questioning the extent to which constitutional pluralism helps or hinders the management, and ultimately, the resolution of that crisis.

Lawrence's contribution looks at the migration crisis from the viewpoint of constitutional pluralism. She emphasizes the idea of constitutional pluralism as discourse and unearths the hidden normative commitments embedded in different models which involve implicit claims about the limits of the toleration of difference by the EU legal order, which she analyses in the context of the Hungarian Constitutional court's rejection of the EU's refugee distribution system. Kelemen and Pech's contribution looks at the rule of law crisis in Hungary and Poland. They decry the misuse of constitutional pluralism by their populist governments to centralise power in their domestic systems and defy EU law. They robustly and polemically lay the blame for these developments at the feet of the model of constitutional pluralism itself as giving succour to authoritarian regimes, concluding that it is no longer suited to the new threats to European integration from these developments.

Mac Amhlaigh and Wilkinson focus on the role of sovereignty in the Brexit crisis and the eurozone crisis respectively. Mac Amhlaigh emphasizes the resolutely post-sovereign nature of constitutional pluralism, arguing that it provides both a good account of the pre-Brexit relationship between the UK and EU as well as, perhaps counterintuitively, the post-Brexit relationship. Notwithstanding the assertions of sovereignty which accompanied the Brexit vote, he argues that the post-sovereignty of constitutional pluralism will continue to capture the post-Brexit future of EU/UK relations as well as the future of EU institutional reform. Conversely, Wilkinson claims that pre-Maastricht integration marked a period of repressed sovereignty suited to constitutional pluralism, which was subsequently liberated in the post-Maastricht era as exemplified by the BVerfG's Maastricht judgement. However, this resurgent

sovereignty is of an asymmetric and distorted form and is clearly evident in the management of the eurocrisis by powerful EU Member states.

As a model of European legal integration, constitutional pluralism explicitly highlighted and embraced the tensions in the integration project. These tensions have been brutally foregrounded since 2008, and the individual contributions to the symposium raise the question of whether constitutional pluralism's delicate balancing of these tensions can be sustained in the uncertain post-crisis future of integration.